

McAuliffe



Comptroller General
of the United States

Washington, D.C. 20548

144981

Decision

Matter of: Hawkins & Powers Aviation, Inc.

File: B-244360

Date: October 7, 1991

Gene A. Powers for the protester,
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq.,
Department of the Interior, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Protester's proposal was properly rejected as unacceptable where firm took exception in its best and final offer to material term of the solicitation which would have compromised the agency's rights under the proposed contract.
2. Protest that specifications are restrictive or otherwise defective is dismissed as untimely when not filed before the closing date for the receipt of proposals following the incorporation of the allegedly restrictive specifications into the solicitation.

DECISION

Hawkins & Powers Aviation, Inc. protests the award of a contract to T&G Aviation, Inc. under request for proposals (RFP) No. 8191-02, issued by the Department of the Interior, Office of Aircraft Services, for a large multi-role C-130A aircraft with crew, including operation, maintenance and inspection services, to support the fire management mission of the Bureau of Land Management, Alaska Fire Service. Hawkins alleges that the agency improperly rejected its proposal on the ground that the firm's best and final offer (BAFO) did not comply with a material term of the solicitation.

We deny the protest in part and dismiss it in part.

The solicitation, issued on December 21, 1990, contemplated the award of a firm, fixed-price contract. The agency anticipated competition among commercial operators which have acquired surplus military C-130A aircraft.

Award was to be made to the offeror whose proposal was determined to be the most advantageous to the government in accordance with the technical evaluation factors for award listed in section M of the RFP. These factors included, in descending order of importance: (1) support capability (including the firm's maintenance plan); (2) past availability; (3) aircraft; (4) safety/accident issues; (5) business practices; and (6) flight crews.

Hawkins and T&G Aviation submitted proposals by the January 30, 1991, closing date. Although Hawkins proposed a maintenance plan that had been approved by the Federal Aviation Administration (FAA), as required by the RFP, the agency was concerned that Hawkins' maintenance plan failed to reference the Air Force technical order C-130A-6 manual which was developed as an inspection and maintenance guide for the aircraft. The manual provides aircraft inspection and maintenance requirements, including required intervals between certain inspections. Since the agency intended the RFP's aircraft maintenance requirements to be centered around the requirements contained in Air Force technical orders for the C-130A aircraft and the aircraft's FAA-approved type certificate data sheet, which prescribes conditions and limitations on the aircraft's airworthiness, the agency amended the solicitation on April 4 to clarify these requirements. Subsections CT5.02 and CP5.02 of the RFP were amended to require that the offeror's:

" . . . approved aircraft's maintenance program shall adhere to the inspection, servicing and maintenance requirements of all U.S. Air Force Technical Orders . . . for C-130A aircraft and the aircraft's type certificate data sheet."

The RFP, at subsections CT5.02-01 and CP5.02-01, as amended, provides that "deviation from any of the [technical orders] will be submitted in writing for review by the contracting officer for approval prior to performance under the contract." The FAA and original equipment manufacture supported the need for these requirements.

Hawkins' FAA-approved aircraft type certificate states at note four that "[c]ompliance with applicable Time Compliance Technical Orders for the aircraft and engines must be shown." Note six of the type certificate states that Hawkins must show that "[c]ompliance with all [Air Force] Technical Orders which affect airworthiness have been accomplished." During

negotiations, Hawkins informed the agency that its FAA-approved aircraft maintenance plan and type certificate did not, in its opinion, encompass a requirement to comply with all Air Force technical orders for the aircraft, including Air Force time compliance technical orders (TCTOs) for the aircraft. The agency believed, however, that Hawkins' type certificate already obligated the firm to comply with the Air Force TCTOs required under the RFP and informed the protester of this position during discussions. By letter of April 9, the agency requested the protester to submit its BAFO by April 15. In that letter, the contracting officer advised Hawkins that it was being afforded the opportunity to formally express its interpretation that compliance with military TCTOs was not required under its aircraft type certificate. The agency's letter further cautioned Hawkins that the firm's interpretation of the requirement would be an important consideration in the evaluation of its proposal and the administration of any resultant contract.

Hawkins submitted its BAFO on April 15, in which the protester acknowledged receipt of the April 4 amendment requiring adherence to all Air Force technical orders (including all Air Force TCTOs) for the C-130A aircraft. Hawkins stated in its BAFO, however, that:

"[a]s to [RFP subsection] CT5.02 and its reference to [all technical orders] of the [Air Force] maintenance, inspection, and servicing, we find this to be too far reaching to be enforceable. We cannot change our approved maintenance program to include this but we commit ourselves to cooperate on this issue and not compromise safety."

Further, the protester advised the agency in its BAFO that:

"[Hawkins] also shall meet the contract requirements of the contract and not compromise safety, however, with reference to our type certificate we do not concede that note four refers to [Air Force] technical orders."

The agency determined that these statements in Hawkins' BAFO qualified the protester's commitment to adhere to the solicitation's maintenance requirements (i.e., for compliance with all Air Force technical orders regarding the operation and maintenance of the aircraft) and, consequently, rejected the firm's proposal for taking exception to a material term of the RFP. On April 30, Hawkins filed an agency-level protest of the rejection of its proposal. The agency denied that protest by letter of May 30. Hawkins subsequently filed its protest with our Office on June 6. The protester basically contends that the agency unreasonably rejected its proposal.

Hawkins also contends that the RFP's requirement for adherence to all Air Force technical orders is unduly restrictive and impossible to perform because of the large number of existing orders and because some of the military technical orders for the aircraft do not apply to the agency's civilian use of the aircraft.

In response, the agency contends that Hawkins' BAFO took exception to the Air Force maintenance requirements as provided under the RFP. The agency explains that its interests in health and safety required a high level of maintenance. The agency sought to maintain the aircraft in a manner consistent with its previous maintenance by requiring compliance with Air Force technical orders for the aircraft. The agency explains that only approved deviations of those requirements after award were to be permitted. The agency found Hawkins' approach unacceptable because the protester's BAFO did not contain an unqualified agreement prior to award, as required, to comply with military orders which the agency considered essential to the safe and proper operation and maintenance of the aircraft. In this regard, in discussions, the agency specifically questioned the protester's interpretation that its type certificate did not obligate it to comply with military technical orders, especially since the agency, the aircraft manufacturer, and the FAA supported the requirement for such compliance. Further, since the agency believed the protester was already required to comply with the military orders under the terms of its FAA-approved type certificate for the aircraft, the agency felt it did not, in any case, have the authority to waive the requirement. Since in the agency's view, it was incumbent upon Hawkins to submit a BAFO which was free from any ambiguity, the agency states the contracting officer's rejection of the protester's final proposal as technically unacceptable was reasonable.

In negotiated procurements any proposal that fails to conform to material terms and conditions of the solicitation should be considered unacceptable and may not form the basis for an award. See Bridge Street Acquisition Corp., B-239121.3, Nov. 13, 1990, 90-2 CPD ¶ 388; Martin Marietta Corp., B-233742.4, 69 Comp. Gen. 214, (1990), 90-1 CPD ¶ 132. An offeror must write its proposal so that it clearly demonstrates that it meets the material requirements of the RFP, otherwise the offeror runs the risk of having the proposal rejected. See Mannesmann Tally Corp., B-238790.4, Oct. 16, 1990, 90-2 CPD ¶ 293.

Although Hawkins argues it intended to comply with all pertinent Air Force technical orders, the protester's intention to meet the RFP's requirements is not clear from the firm's BAFO. The manner in which Hawkins phrased its intended compliance reserves the right for Hawkins to choose after

award which Air Force technical orders it will or will not in fact comply with, a degree of discretion which was not permitted under the terms of the RFP. Although the agency recognizes that some military technical orders will not apply to its civilian aircraft operation, the agency, as provided by the RFP, reserved the right, consistent with health and safety concerns, to make such applicability determinations after award by approving specific deviation requests submitted by the contractor. Although Hawkins' maintenance plan does use a number of Air Force technical orders, the protester selectively deleted several requirements imposed by other such orders--such as those regarding inspection and overhaul requirements of critical engine and propeller components. We agree with the agency that Hawkins' BAFO took exception to the solicitation maintenance requirements since it compromised the rights of the agency, as set forth in the RFP, by effectively eliminating the agency's ability under the resulting contract to enforce the contractor's compliance with any Air Force technical order that the protester might choose not to follow.

The contractor's compliance with the Air Force maintenance requirements was a material provision of the amended RFP, which was repeatedly communicated to the protester. The offeror's maintenance plan was a stated evaluation factor under the solicitation, and the amended RFP clearly called for compliance with all Air Force technical orders. The protester was advised in oral and written discussions, and finally in the agency's BAFO request, that Hawkins' intent to comply with military technical orders was of primary concern to the agency and would be an important consideration for award.

Since Hawkins submitted a BAFO which did not show its unequivocal commitment to all of the RFP's maintenance requirements, we have no basis for disturbing the agency's conclusion that the BAFO was technically unacceptable. The EC Corp., B-236973, Jan. 5, 1990, 90-1 CPD ¶ 23.1/

Finally, to the extent Hawkins contends that the RFP's requirement for compliance with all Air Force technical orders regarding the maintenance of the C-130A aircraft is unduly restrictive, its protest is untimely. Our Bid Protest Regulations require that any protest, such as this one, based

1/ Hawkins also challenges the award to T&G Aviation based upon its belief that the awardee failed to submit required FAA certifications, namely a Part 125 operations certification and an approved minimum equipment list. The record confirms, however, that the awardee did in fact submit the required Part 125 certification with its BAFO and that the RFP did not require an approved minimum equipment list as a condition for award.

upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to that date, 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Alleged improprieties, such as those involved here, which do not exist in the solicitation as issued initially, but which are subsequently incorporated into the solicitation by amendment must be protested no later than the next closing date for receipt of proposals following the incorporation. Id., Helitune, Inc., B-235527, June 23, 1989, 89-1 CPD ¶ 598. Since Hawkins filed its protest after April 15, the closing date for receipt of BAFOs, its protest is untimely and not for consideration on the merits. See Far East Center Assocs. Ltd. Partnership, B-239007, Apr. 13, 1990, 90-1 CPD ¶ 390.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel